

**STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES
OF PROFESSIONAL CONDUCT**

MEETING SUMMARY – OPEN SESSION

Friday July 9, 2004
(9:30 am – 4:55 pm)

VIDEO-CONFERENCE MEETING

**SF-State Bar Office
180 Howard Street, Room 8-B
San Francisco, CA 94105**

**LA-State Bar Office
1149 So. Hill Street, Room 723
Los Angeles, CA 90015**

Members Present: In LA: Harry Sondeim (Chair); Ed George; Stanley Lamport; Raul Martinez; Ellen Peck; and Tony Voogd. In SF: Linda Foy; Joella Julien; Kurt Melchior; Hon. Ignazio Ruvolo; Jerry Sapiro; and Paul Vapnek.

MEMBERS NOT PRESENT: Karen Betzner; and Mark Tuft.

ALSO PRESENT: Sandra Boerio (State Bar Staff); Randall Difuntorum (State Bar Staff); Diane Karpman (Beverly Hills Bar Association Liaison); Louisa Lau (COPRAC); Toby Rothchild (Access to Justice Commission Liaison); Ira Spiro (State Bar ADR Committee); Mary Yen (State Bar Staff).

I. APPROVAL OF ACTION SUMMARIES FROM THE FEBRUARY 20, 2004 AND MAY 7 & 8, 2004 MEETINGS

The February 20, 2004 open session action summary was approved. At the request of staff, consideration of a May 7 & 8, 2004 summary was postponed.

II. REMARKS FROM THE CHAIR

A. Chair's Report

The Chair addressed the issue of arriving on time for the meetings so that they can start as close as possible to the scheduled time. The Chair also addressed getting comments in earlier in order to meet the overall project deadline for the Commission's work.

B. Staff's Report

Staff reported on the Supreme Court's approval of new of Rule 3-100, operative July 1, 2004. It was indicated that the rule was slightly modified by the Court in a few places in the discussion section but not the rule itself. Staff also provided an update on AB 2713, the government attorney whistle-blower bill.

III. MATTERS FOR ACTION

A. Consideration of Rule 1-400. Advertising and Solicitation

The Commission considered a May 29, 2004 e-mail message from Mr. Mohr presenting Draft 2 (5/28/04) of proposed advertising and solicitation rules patterned after MR 7.1 to 7.6. Following discussion, the Commission made various drafting decisions that are summarized below. For the next meeting, the co-drafters were asked to: (1) implement the drafting decisions discussed; (2) develop proposed discussion sections; and (3) provide a recommendation as to the handling of the RPC 1-400(E) advertising standards.

In MR 7.1 the first issue discussed was the inclusion and positioning of the definition of "communication". On the one hand, it was felt that placement of a definition at the beginning of the rule would avoid confusion in interpreting the rule. On the other hand, it was noted that placement at the end of the rule would be consistent with the MR's format. A motion was made to move the definition of "communication" to the beginning of the rule. The motion carried with a commission vote of 6 yes, 2 no, and 1 abstention.

The second issue was the possible inclusion of the word "material" in proposed rule 7.1 (b)(1) or (b)(2) (e.g., "any *material* untrue statement" (b)(1), or "any *material* misrepresentation of fact or law" (b)(2)). Among the points raised during this discussion were the following:

- (1) The word material should be added to avoid the possibility of disciplinary charges resulting from immaterial inaccuracies in lawyer advertisements.
- (2) The rules are used as a basis for imposing civil liability and this proposed rule should not expose lawyers to liability unless the misrepresentation is material.
- (3) The issue of materiality is a "can of worms" that, in concept, reaches other parts of the RPCs (i.e., misrepresentations to a tribunal). It is a slippery slope and it should be left out. If raised here it would set a precedent requiring the Commission to address materiality concerns in all other relevant parts in the rules.
- (4) There should be a concern not only for the lawyers who are charged, but also with the interest of the public. The rule is intended to protect the public and the word material would not make a big difference by blurring the line for false content in lawyer advertising.
- (5) Materiality is a element in the concept of civil fraud. In the context of advertising, it would not have the same meaning and would only cause confusion.

- (6) Section 6157.1 of the State Bar Act does not use the word material and we would be out of sync with the State Bar Act if we added it here.
- (7) If the purpose of the rule is to protect the public, then lawyers should tell the truth in all aspects of whatever communication is made. No degrees of falsity should be permitted.

Following this discussion, a motion was made to add the word "material" in Rule 7.1(b)(2) and failed by a vote of 2 yes, 6 no, 1 abstention.

The issue of the amount of time an attorney should keep an advertisement was addressed in proposed rule 7.1(d). It is currently at two years in RPC 1-400(F) but it was suggested that it be changed to either one year or deleted. Among the points raised during this discussion were the following:

- (1) The ABA removed its retention standard from the Model Rules, in part, in recognition of electronic and website advertising.
- (2) The OCTC might have input on whether the retention standard should be deleted.
- (3) Consistency with the State Bar Act that provides for a one-year retention period must be addressed
- (4) Even if the retention standard in RPC 1-400 and in the State Bar Act were deleted, the risk management advice would still be to retain copies of advertisements for some period of time.

Following this discussion, a motion was made to delete the current retention requirement in RPC 1-400 and to make a conforming recommendation that the State Bar seek the repeal of the State Bar Act retention period (B&P Code §6159). The motion carried with a vote of 6 yes, 1 no, 1 abstention.

In proposed rule 7.1(e)(1) the phrase "domain name" is used as a professional designation of a member or law firm. It was suggested that a domain name would not, in every instance, be a communication for purposes of the rule. It was also suggested that meta-tags be mentioned in the discussion. A motion was made to move "domain name" from (e)(1) to (e)(2) after "brochure." This motion carried with a vote of 6 yes, 0 no, and 1 abstention. Next, a motion was made to address meta-tags in a proposed rule discussion section. This motion also passed with a vote of 5 yes, 1 no, 1 abstention.

There was a proposal that a specific reference to the Evidence Code should be used in 7.1(e)(2). The rule would read "or any other writing as defined in Evidence Code §250" instead of "other comparable writing." In discussing this change, it was suggested that a reference to a specific Evidence Code section should not be used and, instead, use a general reference to the Evidence Code. A motion was made to have a general reference to the Evidence Code in 7.1(e)(2). The motion carried by a commission vote of 7 yes, 0 no, and 0 abstentions.

The last issue discussed in proposed rule 7.1 was the inconsistency with the terminology used in (e)(2) and (e)(4). The Commission agreed to let the co-drafters use their discretion in making these two subparagraphs consistent.

The second rule discussed was proposed rule 7.2. The Commission first addressed the proposal to make a cross reference in the discussion to the State Bar Act and to substitute-in the recommended language that is found at endnote 28 of the agenda

materials. There was no discussion on this motion and it carried with a vote of 6 yes, 0 no, and 3 abstentions.

In proposed rule 7.2 (b)(4) the term "nonmember professional" was used. The Commission discussed the qualifier "professional" in addressing the propriety of client referrals. Among the points raised during this discussion were the following:

- (1) This is an expansion of the advertising rule that will restrict the discussions of rules 2-200 and 1-320. These are reciprocal referral arrangements not just referrals to lawyers. This has a broader implication than just advertising.
- (2) This matter should not be in the advertising section at all because of the "pay to play" issues. This is a separate substantive subject.
- (3) Paragraph (b) is appropriate because paying for referrals is part of marketing legal services and lawyer advertising. As proposed by the co-drafters, a reciprocal referral agreement is fine so long as it is not exclusive and complies with other applicable rules. It is in the consumer's best interest to allow but regulate reciprocal referrals.
- (4) As drafted, the standard is misleading as it could be misread to suggest that it is acceptable to pay money for referrals.
- (5) The word "professional" limits the rule to certain kinds of people. Some non-professionals should be included that may not be allowed by this rule. What is considered professional in this context?
- (6) If the word "professional" is deleted, then it is unclear why the phrase "member or a non-member" is being used.
- (7) As a technical nit pick, the co-drafter's proposed rule language uses the word "client" but a person seeking legal advice is not yet a client. Rather, such persons are just people who may be seeking legal services.

A motion was made that paragraph (b) read: "A member shall not give anything of value for recommending the member's services except that a member may. . ." Subparagraph (b)(4) would read: "Make referrals pursuant to an agreement not otherwise prohibited under these rules that provides for another to refer clients or customers to the member if. . ." The motion carried with a commission vote of 7 yes, 0 no, and 2 abstentions.

A motion was then made to delete all of subparagraph (b)(2) from proposed rule 7.2. This motion failed with a vote of 5 yes, 5 no, and 0 abstentions. Another motion was made to change proposed rule 7.2 (b)(4)(ii) to say: "the member informs the client of the existence and nature of the agreement." It was observed that this seems like something that a lawyer would already do and it should not matter if the lawyer does this or if someone else informs the client. The motion failed with a vote of 3 yes, 5 no, and 0 abstentions. There was a motion to delete all of 7.2 (b)(4)(i). This motion also failed by a vote of 3 yes, 5 no, and 1 abstention.

Paragraph (c) reads, "Any communication made pursuant to this rule shall include the name and office address of at least one member or law firm responsible for its content." A concern brought up in conjunction with this rule was cooperative advertising by independent lawyers. It was observed that it may be difficult to identify who is responsible when the ad comes from a group of lawyers who are engaged in joint

advertising and that the ABA approach is to identify one firm that is involved with the ad. Among the points raised during this discussion were the following:

The problem with using only a telephone number is that it is hard to tell if it is local, especially with the use of 888 numbers and cell phones. This can be confusing to the public.

- (1) Basic information should be on the ads. The excuse of there being not enough "precious" space is not good enough.
- (2) If you have a name and a phone number you do not know where that person is, an address should be added. Home city is also not enough.
- (3) A bar number is not a good idea because an active member could live in another state. There is no guarantee that the member is local. Just having a State Bar number does not inform a consumer that they can call the State Bar to obtain more information. The approach of using a State Bar number is not consistent with the ABA approach.
- (4) The requirement should be limited to the official office address or the home office city. The State Bar should not become a directory for consumers finding lawyers.
- (5) The whole purpose of an advertisement is to help the person looking at the ad find the advertiser.
- (6) We should include the language of the ABA, which is to keep the office address of one member. Uniformity is needed. The cooperative is not unduly burdened because it is still able to decide which phone number to include.

A motion was made to accept proposed rule 7.2(c) as written. The motion carried with a vote of 10 yes, 0 no, 0 abstentions.

A motion was made to put the sentence: "where a group of lawyers engage in cooperative advertising, any communication made pursuant to this rule shall include the name and office address of at least one member of the group responsible for its content" into the rules itself. The motion failed with a vote of 1 yes, 9 no, 0 abstentions. Another motion was then made to add the above sentence to the discussion. This motion passed with a vote of 9 yes, 0 no, 1 abstention.

Next discussed was proposed rule 7.3. A problem of constitutionality was brought up in an email by Samuel Bufford. Mr. Bufford asserts that 7.3(a) and (b) are unconstitutional. Among the points raised during this discussion were the following:

- (1) This proposed rule is constitutionally vulnerable and the Commission should rethink it. *Edenfield v. Fane* (1993) 507 US 761 is a good forecast of what will happen to the rule if it is applied to the solicitation of business from a sophisticated client.
- (2) There is nothing wrong with a lawyer approaching an in-house counsel of a corporation.
- (3) It is up to the high courts to decide an issue of constitutionality. This is a potentially endless debate that cannot be resolved by the Commission because it requires a prediction of how a reviewing court might interpret the rule in a particular set of facts.

- (4) The potential for a constitutionality issue would be adequately addressed by incorporating and extending the savings/severability clause in current RPC 1-400(B).

A motion was made to delete proposed rule 7.3(a) and failed with a vote of 2 yes, 7 no, and 1 abstention.

A question was raised as to whether a definition of solicitation should be included in the rule. It was observed that there is no need for a separate definition of "solicitation" as the subject of prohibited conduct is sufficiently described in the paragraphs of the rule. A motion was made to not include a definition of solicitation. The motion passed with a vote of 7 yes, 0 no, and 3 abstentions.

Next discussed was the phrase "live telephone" as used in proposed rule 7.3(a). While no live telephone solicitation would be permitted under the proposed rule, the question arose as to whether any type of telephone contact would be allowed. An example of non-live telephone contact would be a pre-recorded phone message. Among the points raised during this discussion were the following:

- (1) Live is correlative to "real time."
- (2) The concern is that when making the decision to get legal representation, the potential client has time to reflect when it is non-live (such as inter-active recorded) as opposed to live.

A motion was made to delete "live" from the rule. The motion carried with a vote of 5 yes, 2 no, 0 abstentions. Mr. Mohr volunteered to draft discussion section language that distinguishes live telephonic contact from pre-recorded message contact.

A motion was made to delete the words "the member's" from the third sentence of proposed rule 7.3(a). An argument was made that the phrase is repetitive and does not add to the rule. The motion failed with a vote of 3 yes, 4 no, and 2 abstentions.

Included in the proposed rule was bracketed language stating: "the communication is protected from abridgment by the Constitution of the United States or by the constitution of the State of California or. . . ." The Commission discussed the continued inclusion of this language.

- (1) The language adds nothing to the rule. It should not be included.
- (2) If the language is left in, then we do not need to address the constitutionality issue.
- (3) This language avoids the "all or nothing" invalidation of the rule.

A motion was made to include this language as part of the rule. The motion carried with a Commission vote of 6 yes, 1 no, and 1 abstention.

Next discussed was the phrase "real time electronic contact" as used in proposed rule 7.3(b). The Commission observed that real time electronic contact is similar to instant messaging while the opposite would be a message board. A

motion was made to include the proposed phrase in the rule and to highlight it for public comment. The motion passed with a vote of 6 yes, 1 no, and 1 abstention.

An issue concerning the word "intrusion" in proposed rule 7.3(b)(2) was raised. It was observed that a blanket prohibition against intrusion is important for protection of privacy rights and should be kept in the rule. Among the points raised during this discussion were the following:

- (1) The rule is intended to protect the public from other people's improprieties.
- (2) The idea of giving people privacy from lawyers is, itself, an injustice because it favors defense and insurance adjuster interests.
- (3) The client who has not been advised by a lawyer promptly likely will lose many rights. This particular word is not needed here and could be considered anti-consumer.

A motion was made to delete the word "intrusion" from the proposed rule. The motion failed with a vote of 2 yes, 5 no, and 2 abstentions.

A motion was made to add the phrase "words of similar import" to the end of 7.3(c). The motion passed with a vote of 7 yes, 0 no, and 3 abstentions.

Next discussed was the phrase "unless it is apparent from the context that the communication is an advertisement" as used in proposed rule 7.3(c). Among the points raised during this discussion were the following:

- (1) This basic requirement, itself, is simply stated. The proposed added nuance is not necessary and just adds extra words.
- (2) Sometimes it is not apparent that the ad is an advertisement, especially with longer commercials.
- (3) As this language is being essentially moved from existing RPC 1-400(E), standard no. 5, the concept of a rebuttable presumption is no longer present. By deleting this language, an existing affirmative defense would be eliminated.

A motion was made to strike this phrase from the proposed rule. The motion failed with a vote of 2 yes, 8 no, and 0 abstentions.

Next discussed was proposed rule 7.4. A question arose about the need for provisions (b) and (c). There was consensus that these traditional provisions should be included in these rules. A motion was made to change the language regarding patent lawyers to "registered to practice before the Patent Office. . . ." The motion carried with a Commission vote of 9 yes, 1 no, and 0 abstentions.

A motion was made to change "certified as a specialist" to "certified specialist" in 7.4(d). This change was agreed by consensus. A motion was made to change "a member" to "he or she" in 7.4 (d) and carried with a vote of 8 yes, 2 no, and 0 abstentions.

Another question was raised as to whether the Commission should change "the member" in 7.4(a) to "he or she" so that the rule will read as follows: "A member may communicate the fact that he or she does or does not practice in particular fields of law." This may not work because there will be two contiguous disjunctive constructs ("he or she" and "does or does not"). No vote or discussion was taken on the matter.

Next discussed was proposed rule 7.5. There was concern that current RPC 1-400(E) standard no. 12 was not included in the rule. In response, it was observed that the co-drafters were merely trying to model this California rule after the ABA rules and did not intentionally remove standard no. 12. Among the points raised during this discussion were the following:

- (1) A concern was raised about the difference in the California standard and the ABA standard. It was claimed that the California standard is lost if the ABA language is used.
- (2) Another member claimed that the California standard is not lost because the ABA language is in addition to the California standard.
- (3) All of these changes are not matters of great substance and we are acting contrary to the goal of uniformity with the ABA in the area of advertising and solicitation rules.

A motion was made to strike proposed rule 7.5(c). The motion failed with a vote of 5 yes, 6 no, 0 abstentions.

Another issue raised in proposed rule 7.5 was the designation "of counsel" as described in 7.5(e). It was observed that many practitioners have differing understandings about the proper use of the term. By consensus, it was agreed that this should be removed from the rule but kept in the discussion or as a standard.

Finally, proposed rule 7.6 was discussed. It was suggested that this rule should be totally stricken from the advertising rules as well as the entirety of the RPCs. Among the points raised during this discussion were the following:

- (1) A problem with this proposed rule is the potential for uneven application.
- (2) This rule is about the pay to play problems and not just limited to judges. Most contributions to a judicial election will be from the lawyers. This problem also comes up with Special Masters, Referees and Conservators (appointed by the winning judge).
- (3) If there is a problem, then let's propose something that fixes it. If this is a problem, then it is on the judicial end and there may not even be a problem. There are already rules that deal with judges.
- (4) This rule does not get at what the wrong conduct is; it just says that you cannot get to the fruits of the wrong conduct. It does not prohibit the conduct of contributing to get an appointment or engagement, but rather accepting the appointment or engagement. The rule is not very effective by its terms.
- (5) There will be a lot of false complaints regarding this rule. It might be better to go by Business and Professions Code §6106, which is a 'catch-all' regarding corruption. This behavior can be prosecuted under that provision.

A motion was made to strike rule 7.6 since it may be more effectively addressed in Business and Professions Code §6106. The motion carried with a Commission vote of 7 yes, 1 no, and 3 abstentions.

Following this final vote, The Chair directed Mr. Mohr to make revisions as discussed and voted for during this meeting; proposed discussion sections for review by the Commission next time; and include the standards in their respective rules. Mr. Difuntorum noted that the Commission previously voted to recommend retaining the authority granted (RPC 1-400(E)) to the State Bar Board of Governors to adopt advertising standards.

[Intended Hard Page Break]

B. Consideration of a "Practice of Law" Definition

The Commission considered a May 27, 2004 e-mail message from Mr. Mohr presenting Draft 5 (5/26/04) of proposed practice of law rules using the ABA MR format. Discussion of proposed rule 5.4 was deferred to the next meeting. The Commission made various drafting decisions that are summarized below. For the next meeting, the co-drafters were asked to implement the drafting decisions discussed.

The first rule that was discussed was proposed rule 5.3. There was a motion made to make a specific reference to out-sourced employees in the discussion section. There was some concern that this rule gave lawyers a safe harbor by outsourcing work. Others commented that including out-sourced employees in this rule is overreaching. The motion failed with a vote of 4 yes, 6 no, and 1 abstention.

There were many motions to change the phrasing in paragraph (A). The first was to change the language to "a partner, officer or director, or a lawyer...". This motion was passed with a vote of 7 yes, 1 no, and 1 abstention with no discussion. The second motion was to change "person's" to "non-lawyers". This carried with a vote of 8 yes, 0 no, 1 abstention and no discussion. Based on the foregoing, paragraph (A) should read: "a partner, officer or director, or a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer."

Motions were also made to change the wording of proposed rule 5.3(C). One motion was to change "such a person" to "the non-lawyer". There was no discussion on this motion and it carried with a vote of 9 yes, 0 no, 1 abstention. Per this action, proposed rule 5.3(C) would read: "a lawyer shall be responsible for conduct of the non-lawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:". Another motion was made to change "partner" in (C)(2) to "partner, officer or director." No discussion was made and the motion passed with a vote of 8 yes, 1 no, 1 abstention.

At its last meeting, the Commission by consensus decided to retain the phrase "comparable managerial authority". Mr. Sapiro and Mr. Lamport addressed this point re-affirming their opposition and asking that their objections be stated in the minutes.

Some minor drafting matters were raised by Mr. Sapiro, all of which were approved by consensus. The first is to change "with" to "by" in paragraph (f). The reasoning behind this is because lawyers are employed BY a client not with a client. The second error is in (i)(3). There is an end bracket which needs to be deleted. The last error is in discussion paragraph 1, the word "do" needs to be changed to "may" in the last sentence.

The discussion of proposed rule 5.5 started with the adoption, by consensus, of the substance of the pre-August 2002 ABA version of MR 5.5. This was distinguished from the post-2002 ABA version of MR 5.5 that is the product of the ABA MJP Commission and which is a materially different result from the standards set by the California Supreme Court's Task Force on MJP. Within the pre-August 2002 Rule, a motion was made to use the phrase "where to do so" instead of "where doing so" in paragraph (a).

This change was approved by consensus. Another approval by consensus was to adopt the bracketed language in (b).

A motion was made to change the wording of (b) to "assist a person or entity in the performance of activity that constitutes the unauthorized practice of law". This motion carried with a commission vote of 10 yes, 0 no, and 0 abstentions.

A suggestion was made that there needed to be clarifying language that a member being consulted about such matters is not advising the violation of a law. The Chair asked Mr. Melchior and Ms. Peck to draft an amendment to be voted on at the next meeting addressing this issue.

A motion was made to add a sentence that was proposed in a May 2, 2004 email from Mr. Mohr to discussion paragraph 3(f). There were no objections and it was deemed approved.

There was a discussion about letting disbarred lawyers appear before administrative agencies where rules of agencies permit them to do so. Allowing this would be inconsistent with rule 1-311. Since this has been resolved by rule 1-311 it should not be addressed in this rule.

[Intended Hard Page Break]

C. Discussion of Rule Numbering System

Matter carried over. No materials received.

[Intended Hard Page Break]

D. Consideration of Rule 1-710

The Commission considered draft 3 (6/8/04) of proposed amended rule 1-710 and proposed new rule 1-720 presented by Mr. Ruvolo. Mr. Ruvolo indicated that proposed new rule 1-720 (A), (B), and (C), are essentially the same as the prior draft when that rule was combined in rule 1-710. Also regarding proposed new rule 1-720, it was indicated that Mr. Mohr and Mr. Ruvolo extracted from the Judicial Council mediation standards, those provisions that they felt were the fundamental tenants of impartial arbitration. Regarding proposed amended rule 1-710, Mr. Ruvolo indicated that he agreed with two modifications suggested by Mr. Sapiro in his July 7, 2004 e-mail message: (1) deletion of paragraph numbering in the rule text (e.g., deleting "(A)"); and (2) using the phrase "is subject to Canon 6D of the Code of Judicial Ethics" in the place of the comparable phrase found in current RPC 1-710. There was no opposition to the Commission's adoption of these changes to proposed amended rule 1-710. Among the points raised during this discussion were the following:

- (1) MR 2.4 has been incorporated into the rule. There are also references to specific Judicial Counsel standards for mediators that were left in the rule.
- (2) The Legislature passed Code of Civil Procedure §1281.85 inviting the Judicial Council to develop standards for private arbitration. The non-aspirational standards at the core of the ethical tenants of impartial arbitrators were extracted following consideration of the entirety of the standards.
- (3) It should be made clear in the text and in the record that the scope of the former standard has been broadened beyond court-appointed neutrals to cover non-court appointed neutrals.
- (4) There should be an emphasis on the complete neutrality of arbitrators. Consideration should be given to changing the first line of proposed 1-720(A) to "when the member is engaged to impartially assist two or more. . ."
- (5) By having disbarment as a possible punishment, this rule is discouraging lawyers from accepting appointment in arbitration proceedings. This unfairly penalizes the pool of prospective neutrals who are lawyers. Many mediators are not lawyers and would not have to assume a similar risk of punishment. Singling-out lawyers for violating these rules is making lawyers a disfavored class.
- (6) Paragraph (D) does not relate at all to anyone serving on a panel for a court. This is not singling-out lawyers anymore than they are already singled-out. When you talk about singling-out lawyers, it is a misnomer because the State Bar has a mandate to regulate lawyers. This is an issue of what is in the best interest of the public. This is not something where lawyers will be subjected to discipline for picky things; these are fundamental duties that go to the fairness of the system.
- (7) This is an area begging for regulation. It is well settled that lawyers must follow applicable rules in whatever capacity they act. Whenever a lawyer holds himself or herself out to be a lawyer in any context, then they should be required to abide by applicable rules or pay the consequences.

A motion was made to accept the rule as drafted by Mr. Ruvolo with the changes already adopted. The motion carried with a Commission vote of 9 yes, 2 no, and 0 abstentions.

[Intended Hard Page Break]

E. Consideration of Rule 3-600. Organization as Client.

The Commission considered draft 4 (5/10/04) of proposed amended rule 3-600 presented by Mr. Lamport. The Chair called attention to an e-mail by Mr. Tuft in which he stated that he is opposed to the two-tiered approach and wanted it noted in the minutes. Mrs. Julien also expressed general concerns about the proposed amended rule. Among the points raised during this discussion were the following:

- (1) Under proposed rule 3-600(F), there is a concern about to whom the employee reports when they are discharged and what the member is supposed to report beyond the mere fact of the discharge.
- (2) Under proposed rule 3-600(F), the lawyer reporting that they are discharged is not enough; they must report that they believe that they were discharged because of efforts to correct misconduct.
- (3) Consideration should be given to clarifying paragraph (F) in the discussion section.
- (4) Even if the lawyer discloses to the highest authority, the immediate supervisors may not be informed of the reason for the discharge.
- (5) The point of reporting up to the highest authority is so the highest authority can perform its fiduciary duty regarding corporate governance.
- (6) The lawyer is protecting the organization so they must go up the ladder. There is no requirement or ability to go outside the organization.
- (7) Even if a two-tier approach is not ultimately adopted, the Commission's record will show that it considered options for enhancing accountability short of outside reporting provisions.

Following the discussion, the Commission considered a motion to make the trigger in (C) to require a violation of law or a fiduciary breach and substantial injury. The motion failed by a vote of 1 yes, 6 no, and 1 abstention. The Commission also agreed that Mr. Lamport would address paragraph (F) by mail ballot and take into consideration the concerns voiced by the Commission members. Mr. Lamport is assigned to clarify whether the member would be held to a mandatory duty to inform the "highest internal authority" of the circumstances or of the fact of the member's discharge, or both.

[Intended Hard Page Break]

F. Consideration of Rule 1-500. Agreements Restricting a Member's Practice.

The Commission considered Mr. Melchior's July 5, 2004 e-mail message recommending that paragraph (b) be modified to read: "that restricts any lawyer's right to practice law." He stated that the rule as previously drafted would have only reached a member's agreement to restrict his or her own practice and now the rule will also reach a lawyer who tries to obtain another lawyer's agreement to restrict his or her practice.

Mr. Melchior presented amendments to the rule so it is to be read as "Notwithstanding subparagraph (a) of this rule or unless otherwise proscribed by law, a member may offer to enter into an agreement that provides for forfeiture of any of the compensation to be paid by a law firm to a lawyer after termination of that lawyer's membership in or employment by that firm, if the lawyer competes with the law firm. . ." These amendments were approved by consensus.

During the discussion of this, the issue of ERISA arose. Some members thought this rule was running afoul of ERISA. The Commission agreed that this was a possibility and that when the rule is out for comment experts on ERISA would have an opportunity to evaluate any conflict.

[Intended Hard Page Break]

G. Consideration of Rule 2-200. Financial Arrangements Among Lawyers.

Matter carried over.

[Intended Hard Page Break]